UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALORICA, INC. AND ITS SUBSIDIARY/AFFILIATE EXPERT GLOBAL SOLUTIONS, INC.,	)	**CASE NO. 18-CA-190846**
AND	)	
OPEIU, LOCAL 153, OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO	)	

ALORICA, INC. AND ITS SUBSIDIARY/AFFILIATE EXPERT GLOBAL SOLUTIONS, INC.,	)	**CASE NOS. 25-CA-185622 and 25-CA-185626**
AND	)	
SETH GOLDSTEIN AND OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 153	)	

RESPONDENT ALORICA, INC. AND ITS SUBSIDIARY/AFFILIATE EXPERT GLOBAL SOLUTIONS, INC.'S REPLY TO THE ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS ON BEHALF OF COUNSEL FOR THE GENERAL COUNSEL

In GC Memo 18-02, newly appointed General Counsel Peter Robb identifies recent Board decisions involving employer rules "where the outcome would be different if Chairman Miscimarra's proposed substitution of the *Lutheran Heritage* test was applied" as ripe for reconsideration. These cases, involving the overly broad, paternalistic application of *Lutheran Heritage* in *U=Haul of California*, 347 NLRB 375 (2006) and its progeny to void rules and policies which "might" be construed to prohibit the filing of unfair labor practice charges, fits squarely into General Counsel Robb's instruction. The language in Respondent's Arbitration Agreement ("Agreement") makes no mention of Section 7 activity that is prohibited and in no

way prevents employees from filing charges with the Board. In fact, reading the Agreement in its entirety leaves no question that the intended application of the Agreement is to avoid drawn-out litigation before a court or a jury by requiring arbitration of employment-related disputes. The Agreement makes no mention of prohibiting the filing of unfair labor practice charges (or any other agency charges) or other limitations to employee rights protected by Section 7 of the Act. Accordingly, the Board should apply Chairman Miscimarra's proposed test to this case, overrule *U-Haul of California* and its progeny, and dismiss the Complaints in these cases.

In his dissent in *William Beaumont Hospital*, 363 NLRB No. 162 (2016), Chairman Miscimarra states that "the time has come for the Board to abandon *Lutheran Heritage Village-Livonia* [footnote omitted] which renders unlawful all employment policies, work rules, and handbook provisions whenever any employee "would reasonably construe the language to prohibit Section 7 activity" 363 NLRB No. 162 at sl.op. 7. In its place, Chairman Miscimarra advocates that the "Board must evaluate … (1) the potential adverse impact of the rule on NLRA-protected activity; and (2) the legitimate justification an employer may have for maintaining the rule. The Board must engage in a meaningful balancing of these competing interests, and a facially neutral rule should be declared unlawful only if the justification are outweighed by the adverse impact on Section 7 activity" *Id.* At 9. Applying this test to the facts here, Respondent respectfully requests that the Board overrule *U-Haul of California* and its progeny and dismiss the Complaints in the above-captioned cases.

As argued in Counsel for the General Counsel's Answering Brief, the General Counsel's argument relies solely on the word "all" which appears once at the start of the Agreement, assuming without any support in the record that employees would construe this one word as precluding them from filing charges with the NLRB. In essence, Counsel for the General

Counsel's argument is that employees will read the first word of the Agreement and assume the Agreement precludes them from filing unfair labor practice charges. The Agreement, however, makes no mention of unfair labor practice charges or other rights protected by Section 7 of the NLRA. In fact, reading the Agreement in its entirety, it is clear that the intended limitation on employees was to waive the right to class action litigation and to require arbitration for any other dispute that would be resolved "in court or by a jury." The Agreement provides no restriction on filing unfair labor practice charges (or any other agency charges for that matter) as Counsel for the General Counsel contends, nor does the record evidence show that any of Respondent's employees construed or understood the agreement as limiting such filings. In this context, as suggested by General Counsel Robb and advocated by Chairman Miscimarra, the over-broad application of *Lutheran Heritage* as contained in *U-Haul of California* and its progeny must be reconsidered and overruled.

Applying the two-pronged test advocated by Chairman Miscimarra in *William Beaumont Hospital*, there is no question that the Agreement does not violate Section 8(a)(1) by precluding employees from filing charges with the NLRB. The Agreement has no adverse impact on the NLRA-protected activity on which this case focuses.[1] The only issue in this case is whether the Agreement precludes the filing of unfair labor practice charges. It clearly does not.

Moreover, Respondent's justification for the Agreement – wanting to avoid often delayed, lengthy and costly litigation by requiring employees to resolve disputes normally resolved by a judge or jury through arbitration – provides legitimate justification for the Agreement. As set forth in detail in Respondent's Brief in Support of its Exceptions, arbitration has been long-recognized as a preferred way for resolving employment disputes. Thus, the

[1] The parties have entered a conditional settlement agreement regarding the impact of the class action waiver in the Agreement should the Supreme Court determine in cases currently pending before the Court that such provisions violate the Act.

Section 7 implications alleged by the Complaints in these cases, do not outweigh the justification for the Agreement. Indeed, the Agreement as a whole is not intended to interfere with the Section 7 rights of employees to file unfair labor practice charges.

For these reasons, Respondent respectfully requests that the Board overrule *U-Haul of California* and its progeny, replace the *Lutheran Heritage* analysis for work rules and handbook provisions to the analysis set forth in Chairman Miscimarra's dissent in *William Beaumont Hospital*, and dismiss the Complaints in these cases.

DATED this 13th day of December, 2017.

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By: /s/ Harry J. Secaras

Harry J. Secaras, Esq.
155 North Wacker Drive - Suite 4300
Chicago, IL 60606
Phone: (312) 558-1220
Facsimile: (312) 807-3619

CERTIFICATE OF SERVICE

I certify that on December 13, 2017, a copy of the foregoing ***RESPONDENT ALORICA INC. AND ITS SUBSIDIARY/AFFILIATE EXPERT GLOBAL SOLUTIONS, INC.'S REPLY TO THE ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS ON BEHALF OF COUNSEL FOR THE GENERAL COUNSEL*** was Electronically Filed as a .pdf document via the NLRB's e-filing system and transmitted via e-mail and Federal Express to the following parties:

Joseph Bornong
Counsel for the General Counsel
NLRB, Region 18
Federal Office Building
212 Third Avenue South, Suite 200
Minneapolis, Minnesota, 55401
Joe.Bornong@nlrb.gov

Seth Goldstein, Esq.
Local 153, Office & Professional
Employees International Union, AFL-CIO
265 West 14th Street, 6th Floor
New York, NY 10011-7103
Sgold352002@icloud.com

/s/ Harry J. Secaras
Respondent's Counsel of Record

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